Supreme Court, U.S.
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DOCKET NO.:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TELECONCEPTS, INCORPORATION,

Petitioner,

vs.

MCI TELECOMMUNICATIONS CORPORATION and BELL OF PENNSYLVANIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
SUPREME COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

CHARLES J. CASALE, JR., ESQ.
On the Petition for a Writ of Certiorari

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March 21, 1996 Counsel for Petitioner.

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SUPPLEMENTAL APPENDIX

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MCI TELECOMMUNICATIONS CORP.,	
Plaintiff,	Civ. No.92-244(GEB)
v.	
TELECONCEPTS, INC.,	**MEMORANDUM AND ORDER**
Defendant.	

BROWN, District Judge

This matter comes before the Court on cross-motions for summary judgment pursuant to FED. R. CIV. P. 56. For the reasons set forth in this Memorandum and Order, issued without oral argument pursuant to FED. R. CIV. P. 78, the Court will: (1) grant plaintiff's motion for summary judgment and (2) deny defendant's cross-motion for summary judgment.

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I. BACKGROUND

The facts of this case are undisputed. Plaintiff MCI Telecommunications Corp. ("MCI") is a Delaware corporation with its principal place of business located in Washington, D.C. *See* Am. Compl. ¶ 1. Plaintiff is in the business of providing interstate telecommunications services to both individual and corporate customers. *See id.* ¶ 5. Defendant Teleconcepts, Inc. ("Teleconcepts") is a New Jersey corporate with its principal place of business located in Princeton Junction, New Jersey. *See id.* ¶ 2. From January of 1988 until and through December of 1989, plaintiff MCI provided defendant with long distance telecommunications services under the terms and conditions set forth in MCI

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Tariff F.C.C. No. 1 (the "Tariff").[1] *See id.* ¶¶ 5, 8. On December 27, 1989, plaintiff terminated its service contract with defendant due to defendant's failure to meet its payment obligations. *See id.* ¶ 8. Plaintiff did not, however, immediately disconnect defendant's services. *See id.*; Affidavit of Laura Moser, Supervisor or Credit and Collection Department at MCI, dated August 2, 1993, ¶¶ 2, 8 [hereinafter Moser Aff.]. In fact, said services were not disconnected until March of 1990. *See id.*

Thereafter, on January 15, 1992, plaintiff commenced this action against defendant, seeking payment of defendant's delinquent account in the amount of

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[1]The Tariff at issue is filed with and maintained by the Federal Communications Commission (the "FCC"). *See id.* ¶ 5.

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$49,913.29,[2] plus costs and reasonable attorney's fees. *See* Am. Compl. ¶¶ 7, 9-11; Moser Aff. ¶ 11. On August 25, 1992, defendant moved to dismiss the Complaint pursuant to FED. R. CIV. P. 4(j) for failure to effect proper service of the Summons and Complaint within 120 of the filing of said Complaint. This Court denied that motion by Order dated September 15, 1992. MCI then moved before this Court for summary judgment pursuant to FED R. CIV. P. 56, claiming that plaintiff's claims are time-barred by the two-year statute of limitations set forth in 47 U.S.C. § 415(a) (1988).

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[2]The total value of the unpaid services provided to defendant Teleconcepts by plaintiff is $47,565.84, exclusive of interest. *See* Moser Aff. ¶ 5.

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Concomitantly, plaintiff moved to amend its Complaint pursuant to FED R. CIV. P. 15(a) to clarify certain facts set forth in the record presented to this Court. At the conclusion of oral argument, this Court, by Orders dated May 3, 1993: (1) denied defendant's motion for summary judgment and (2) granted plaintiff's motion for leave to file and Amended Complaint.

This matter was then referred to arbitration pursuant to General Rule 47(D) of the General Rules of this Court. On August 25, 1993, an arbitration award was entered in favor of plaintiff. Consequently, on September 9, 1993, defendant made a demand for a trial *de novo* pursuant to General Rule 47(G). MCI and Teleconcepts now cross-move before this Court for summary judgment pursuant to FED R. CIV. P. 56.

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II. DISCUSSION

A. MOTION FOR SUMMARY JUDGMENT

1. Standards for Summary Judgment

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Schoch*

v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d. Cit. 1990). Issue of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

2. Statute of Limitations

The principal legal issue in dispute is whether this action was filed within the applicable statute of limitations period. Pursuant to 47 U.S.C. § 415(a) (1988),[3] all communications carriers, such as plaintiff, are required to commence

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[3]47 U.S.C. § 415(a)(1988) provides: "All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after." *Id.*

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actions for the recovery of charges within two years from the time the cause of action accrues. *See id.; see also Miller v. AT&T,* 507 F.2d 759, 764 n.8 (3d Cir. 1974) (interpreting the predecessor of 47 U.S.C. § 415(a) which provided for a one year statute of limitations, but was amended in 1974 and increased to two); *see also Ward v. Northern Ohio Tel. Co.,* 381 F.2d 16, 17 (6th Cir. 1967) (similar).

In the instant case, defendant asserts that plaintiff's cause of action accrued on December 27, 1989-the date on which plaintiff terminated its service contract with defendant. In support of its position, defendant refers to the "Payment Arrangements" section of the Tariff which provided in pertinent part: "MCI's bills are payable upon receipt. Amounts not paid within 30 days after the date of invoice will be considered past

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due." *See* Tariff (annexed as Ex. C. to Pl.'s Br.). Based upon this premise, defendant maintains that since plaintiff did not commence this action by December 27, 1991-two years after terminating defendant's service contract, plaintiff's claims are time-barred by the two-year statute of limitations set forth in 47 U.S.C. § 415(a).

Plaintiff maintains that although it canceled defendant's account on December 27, 1989, the services provided defendant were not immediately terminated. *See* Moser Aff. ¶¶ 2, 8; *see also* Affidavit of Karen Vail, Supervisor of the Credit and Collection Department at MCI, dated November 24, 1992, ¶ 3 [hereinafter Vail Aff.]. Moreover, although plaintiff fails to state the exact date in March of 1990 that defendant's telecommunications services were disconnected, plaintiff

asserts that "[t]he last invoice issued to [d]efendant was on March 17, 1990 and payment for that invoice was due on April 16, 1990, pursuant to the thirty day payment provision in the . . . Tariff." *See id.* ¶¶ 3-4. Based upon this premise, plaintiff avers that its cause of action did not accrued until no payment was received by April 16, 1990 and, as such, the instant Complaint was filed well within the two-year statute of limitations.[4]

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[4]Plaintiff also asserts that payment for services provided up to and through December 27, 1989, were not due until 30 days after invoicing pursuant to the terms of the Tariff, and that even if plaintiff had simultaneously terminated defendant's account and issued an invoice, payment would not be due and owing until (cont.)

January 26, 1990.

Moreover, although not asserted here, in opposition to defendant's previous motion for summary judgment, plaintiff also argued that defendant is equitably estopped from asserting its statute of limitations claim because of its relationship with Garden State Copy Company ("Garden State"). Plaintiff maintains that the two corporations operated as one. In this regard, plaintiff asserts that both Garden State's and Teleconcepts' principal places of business are located at the same (cont.) address and both companies share the same president. *See id.* Significantly, plaintiff also provided long distance telecommunications services to Garden State until they were terminated on June 28, 1990. *See id.* ¶ 5. Based on (cont.)

In an action involving the collection of accounts receivable, common sense dictates that in determining the tolling date of the applicable statute of limitations, this Court must look to the date upon which payment was demanded and refused. *See Dewoskin v. Sears, Roebuck & Co. (In re Ford Parcel Serv., Inc.)*, 76 B.R. 697, 699 (Bankr. E.D. Mo. 1987); *Trauner v. Stephenson Assocs., Inc. (In re Valles Mechanical Indus., Inc.)*, 20 B.R. 350, 352 (N.D. Ga. 1982); *see also, Upshaw v. Equitable Life Assurance Soc'y*, 85 F.R.D. 674, 676 (E.D. Ark. 1980).

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this premise, plaintiff maintains that since the two corporations operated as one, plaintiff had in fact provided defendant with services until June 28, 1990, thereby further tolling the two-year statute of limitations.

Therefore, accepting plaintiff's factual contentions in support of its primary argument, this Court concludes that plaintiff had until April 16, 1992-two years after defendant failed to remit payment of its final invoice-to initiate this action. *See* 47 U.S.C. § 415(a) (1988). Since plaintiff filed the instant Complaint on January 15, 1992, well before the expiration of the two-year deadline, the Court will deny defendant's motion for summary judgment with respect to this issue. [5]

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[5]Plaintiff also advances January 26 and June 28, 1990, as alternative tolling dates. *See supra* note 4. In any scenario advanced by plaintiff, this action was commenced prior to the expiration of the two year statute of limitations.

3. Defendant's Liability

In their written submissions to this Court, defendant's only argument against liability on the merits is its assertion that certain "hacking" activities by unknown third parties and plaintiff's failure to mitigate its damages may relieve it of liability. With respect to the "hacking" issue, said assertion is simply without merit as it has been considered and uniformly rejected by four other districts and the FCC. *See AT&T v. Jiffy Lube Int'l, Inc.*, 813 F. Supp. 1164, 1167-68 (D. Md. 1993) (citations omitted). As for the mitigation issue, defendant asserts that plaintiff should have disconnected defendant's services in December of 1989 when it terminated the service contract due to defendant's failure to meet its payment obligations. Such an argument is untenable as

plaintiff's course of conduct as outlined in *supra* part I were reasonable in view of the circumstances as a whole.

III. CONCLUSION

For the foregoing reasons,

It is this 28th day of December, 1993

ORDERED that plaintiff's motion for summary judgment pursuant to FED. R. Civ. P. 56 in the amount of $47,565.84 plus interest and costs, including reasonable attorney's fees, be and is hereby GRANTED; accordingly, plaintiff shall file an affidavit of reasonable attorney's fees within ten (10) days of the date of this Order and defendant shall file any opposition to the affidavit within five (5) days of their receipt of plaintiff's affidavit; and it is

FURTHER ORDERED that defendant's cross-motion for summary judgment pursuant to FED. R. CIV. P. 56 be and is hereby DENIED.

/s/
GARRETT E. BROWN, JR., U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MCI TELECOMMUNICATIONS CORP.,	:	
Plaintiff,	:	Civ. No.92-244(GEB)
v.	:	
TELECONCEPTS, INC.,	:	**MEMORANDUM AND ORDER**
Defendant.	:	

BROWN, District Judge

This matter comes before the Court on plaintiff's application for an award of reasonable attorney's fees and costs consistent with this Court's Memorandum and Order filed on December 29, 1993. For the reasons set forth in this Memorandum and Order, issued without oral argument pursuant to FED. R. CIV. P. 78, the Court will award plaintiff attorney's fees in

the amount of $11,812.50 and deny without prejudice plaintiff's application to recover $586.23 in costs.

I. BACKGROUND

On December 29, 1993 this Court filed an opinion granting plaintiff's motion for summary judgment pursuant to FED. R. DIV. P. 56 in the amount of $47,565.84 plus interest and costs, including reasonable attorney's fees.[1] The Court then ordered plaintiff to file an affidavit of reasonable attorney's fees within ten days and defendant to file any opposition within five days of their receipt of

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[1]This Court adequately set forth the factual and procedural background of this action in this Memorandum and Order filed on December 29, 1993. Accordingly, this Court will incorporate by reference that portion of its opinion.

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plaintiff's affidavit. On January 10, 1994, this Court received from plaintiff's counsel an affidavit of legal fees detailing the hours expended by plaintiff's counsel litigating this action. *See* Affidavit of Kenneth M. Denti, attorney for plaintiff, dated January 10, 1994 [hereinafter Denti Aff.]. By letter dated January 14, 1994, counsel for defendant informed the Court of his blanket objection to the fees requested by the plaintiff's counsel, focussing on the number amount of hours submitted. *See* Letter from Charles J. Casale, Jr. (by Louis A. Reilly), attorney for defendant, to the Court, dated January 14, 1994 [hereinafter Casale Letter]. Defendant's counsel did not, however, object to the hourly rate of $125.00 charged by plaintiff's counsel. *See id.*

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II. DISCUSSION

In order to calculate the amount of attorney's fees to be awarded in a particular case, this Court must "first determine[] the hours reasonably expended by counsel in successfully achieving the result sought by litigation and then multipl[y] those hours by a reasonable hourly rate for the attorney's services." *Joy Mfg. Corp. v. Pullman-Peabody Co.*, 742 F. Supp. 911, 912 (W.D. Pa. 1990) (citing *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Corp.*, 487 F.2d 161 (3d Cir. 1973), *on appeal following remand*, 540 F.2d 102 (3d Cir. 1976). This amount, known as the "lodestar," may the be modified by the Court under certain circumstances. *See id.* at 912-13 (citations omitted).

The affidavit of legal fees submitted by plaintiff's counsel seeks to recover $11,812.50 in legal fees, claiming a total of 94.5 hours spent litigating this action at a rate of $125.00 an hour. *See* Denti Aff. ¶¶ 3-11. In support of this affidavit, plaintiff's counsel has submitted a seventeen page computer-generated detailed record of the time each attorney spent working on the case. *See id.* at Ex. A. Each entry, listed in chronological order, details the general nature and subject matter of the activity and notes the amount of time spent by each attorney. *See id.* In contradistinction, in opposition to plaintiff's application for attorney's fees, defendant's counsel has submitted a two page letter simply stating:

> Counsel for plaintiff has submitted a bill totaling $11,812.50, which I submit is

> not only excessive in terms of dollar amounts but also in time spent with regard to this matter. While I have spent numerous hours on this matter, not only in terms of time for discovery, court appearance[s] and also for research, my hours have come no where near the 94.5 hours and I submit to the Court that this amount of time and requests for attorney[']s fees is excessive in light of the nature of this case.

See Casale Letter.

With respect to the total number of hours plaintiff's counsel claims to have expended in litigating this action, after careful review of the detailed submission of plaintiff's counsel, the Court finds that the actual hours claimed were in fact reasonably expended by counsel. Moreover, it is well settled in this Circuit that when "the actual hours expended and historical fees charged for services have been verified under oath by counsel . . ., these factual allegations will be taken as

true because . . . an unverified challenge to such verified and purely factual matters is insufficient to create a factual issue." *See Joy Mfg. Corp.* 742 F.Supp. at 917 (citing *Rode v. Dellarciprete*, 892 F.2d 1177 (3d. Cir. 1990); *Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989).

As for the hourly rate charged by plaintiff's counsel in exchange for their legal services, as noted above, defendant does not challenge the hourly rate of $125 charged by plaintiff's counsel. *See generally* Casale Letter. Consequently, even if this Court were so inclined, it could not disturb that amount in calculating the award of attorney's fees. *See id.* at 914. ("The district court cannot 'decrease a fee award based on

factors no raised at all by the adverse party." (quoting *Bell*, 884 F.2d at 720)).

In light of the foregoing, the Court will award plaintiff attorney's fees in the amount of $11,812.50. However, with respect to plaintiff's application to recover $586.23 in "costs/disbursements" allegedly incurred, plaintiff has failed to provide the Court with any documentary proof in support of its claim. *See* Denti Aff. ¶ 12. Accordingly, the Court will deny without prejudice plaintiff's application to recover $586.23 in costs.

III. **CONCLUSION**

For the foregoing reasons,

It is on this 25th day of February, 1994,

ORDERED that plaintiff be and is hereby AWARDED attorney's fees in the amount of $11,812.50; and it is

FURTHER ORDERED that plaintiff's application to recover $586.23 in costs be and is hereby DENIED without prejudice.

/s/
GARRETT E. BROWN, JR., U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MCI TELECOMMUNICATIONS CORP.,	:	
Plaintiff,	:	Civ. No.92-244(GEB)
v.	:	
TELECONCEPTS, INC.,	:	**MEMORANDUM OPINION**
Defendant.	:	

BROWN, District Judge

This matter comes before the Court on third-party defendant Bell of Pennsylvania's motion for summary judgment pursuant to FED R CIV. P. 56. For the reasons set forth in this Memorandum Opinion, issued without oral argument pursuant to FED R. CIV. P. 78, the Court will grant the third-party defendant's motions.

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I. BACKGROUND

As stated in this Court's Memorandum and Order dated December 28, 1993, plaintiff MCI Telecommunications Corp. ("MCI") commenced the instant action on January 15, 1992, against defendant/third-party plaintiff Teleconcepts, Inc. ("Teleconcepts") seeking remittance of defendant's delinquent account in the amount of $47,565.84, exclusive of interest. MCI also sought to recover certain costs and reasonable attorney's fees associated with the prosecution of this matter. The facts pertinent to MCI's action against Teleconcepts were adequately set forth in this Court's prior opinion and, as such, need not be reiterated here. In this Court's Memorandum and Order dated December 28, 1993, the Court granted MCI's motion for summary judgment in the amount of

$47,565.84 plus interest and costs, including reasonable attorney fees. Thereafter, by Memorandum and Orders dated February 25, 1994, and April 13, 1994, respectively, this Court awarded attorney's fees in the amount of $11,812.50 and $945.44 in costs.

In the interim, on June 7, 1993, defendant/third party plaintiff Teleconcepts commenced a third-party complaint against third-party defendant Bell of Pennsylvania ("Bell") seeking indemnification and contribution. *See* Third Party Comp. ¶ 8. In its third-party complaint, Teleconcepts asserts that at all relevant times hereto, a contract of services existed between the parties under which Bell "provided local telecommunications lines to public pay

telephones serviced by [Teleconcepts]."[1] *See id.* ¶ 3. The basis for Teleconcepts indemnification and contribution claim lies in its allegation that Bell breached the service contract at issue by permitting unauthorized persons to place long distance telephone calls from the public pay telephones serviced by Teleconcepts without having to pay for said calls-a practice commonly known in the industry as "hacking." *See id.* ¶ 5.

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[1]Under the alleged contract for service, Bell also provided two way budget, touch tone dialing, call screening, dial tone, and both local and long distance telephone service. For purpose of this motion, Bell concedes the existence of the alleged contract for service.

In support of its argument, Teleconcepts maintains that the unauthorized persons known as "hackers" gained access to their long distance lines through a process known as "secondary dial tone" or "dial tone reorganization." According to Teleconcepts, under this process, a hacker would first place a random 800 call from a pay telephone and await a receiving party. The hacker would then remain silent and wait for the receiving party to hand up. Once this occurred, the hacker was then provided with a secondary dial tone that would enable him to dial any long distance number for which the owner of the pay telephone would then be charged. Teleconcepts blames the availability of the secondary dial tone for the unauthorized calls. Upon this premise, Teleconcepts asserts that because Bell was

obligated to provide effective dial-tone service under terms of the service contract, Bell breached its duty by allowing the hackers access to the secondary dial tone. Consequently, Teleconcepts contends that Bell should be held liable for the unauthorized long distance telephone calls and subsequent charges.

Bell now moves before this Court for summary judgement pursuant to FED R. CIV. P. 56 on two grounds. Bell first disputes Teleconcepts' allegation that "hackers" gained access to Teleconcepts' long distance lines through a secondary dial tone. Instead, Bell insists that any unauthorized user could only have gained access through Teleconcepts' own software found within their pay telephones. As such, Teleconcepts is responsible for their own property. Bell next argues that

even if these alleged hackers gained access to the pay telephones through a secondary dial tone as Teleconcepts alleges, there is no basis for holding Bell liable for their long distance calls and subsequent charges due to the Bell of Pennsylvania COCOT Tariff § 18(A)(2)(j) which stipulates that Teleconcepts is responsible for all costs that arise as a result of directly-dialed calls made from its pay telephones.

II. DISCUSSION

A. Standards for Summary Judgment

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Div. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all

reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Liability of Bell

Bell's first contention that hackers could not have gained access to Teleconcepts' long distance lines through

a secondary dial tone is not an issue appropriately disposed of on a motion for summary judgment as it clearly involves a factual dispute. Further more, as noted *supra*, in a motion for summary judgment all reasonable inferences must be taken in the light most favorable to the non-moving party. Consequently, summary judgment cannot be granted ont he basis of Bell's first contention.

However, Bell's second argument that the Bell of Pennsylvania COCOT Tariff places direct responsibility for the unauthorized telephone calls on Teleconcepts is an appropriate basis upon which the grant Bell's motion for summary judgment. The Pennsylvania COCOT Tariff § 18(a)(2)(j) provides in pertinent part:

> The COCOT Service subscriber is considered as the Customer Of Record and is responsible for all rates and charges associated with the service, including but

> not limited to the installation and rates for the Paystation-COCOT Access Line, COCOT Service-Blocking and Screening Options, directory assistance charges, message toll charges and local usage charges. The COCOT Service subscriber shall not be responsible for message toll charges for improperly or erroneously accepted third number billed or credit card calls if the Paystation-COCOT Access Line is arranged with the COCOT Service Blocking/Screening Option.

Id. To assert as Teleconcepts has done, that certain "hacking" activities by unknown third parties will negate its liability for any unauthorized calls is simply without merit and has been considered and summarily rejected by at least five other districts and the FCC. *See AT&T v. New York City Human Resources Admin.*, 833 F.Supp. 962, 970-74 (S.D.N.Y. 1993)(citations omitted). These tribunals have uniformly interpreted tariffs, such as the one applicable here, as holding the

customer responsible for all telephone calls which originate from the customer's number, whether authorized or not. *See id.* (citations omitted). In the instant case, it is undisputed that the unauthorized calls originated from pay telephones serviced by Teleconcepts. Moreover, as quoted *supra*, the Bell of Pennsylvania COCOT Tariff § 18(A)(2)(j) clearly stipulates that Teleconcepts, as the "Customer of Record," be held responsible for all costs that arise as a result of directly-dialed calls made from its pay telephones.

Since it is clear that the unauthorized calls were made from Teleconcepts' pay telephones and the Bell of Pennsylvania COCOT Tariff places direct responsibility for the unauthorized calls on Teleconcepts, the Court will grant Bell's motion for summary judgment.

III. CONCLUSION

For the foregoing reasons, the Court will grant third-party defendant Bell of Pennsylvania's motion for summary judgment pursuant to FED R. CIV. P. 56. An appropriate Order is filed herewith.